BRIEF OF APPELLEES

IN THE

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

No. 22749

HOWARD ELECTRIC CO., a Colorado Corporation

Appellant,

vs.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NO. 570 and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Appellees.

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PREFATORY STATEMENT

For convenience, Appellant Howard Electric Company will be referred to as "Howard." The International Brotherhood of Electrical Workers (an International Union) has by amended complaint been removed as a party defendant. Therefore, for convenience, both the local union, International Brotherhood of Electrical Workers Local Union No. 570, and the International Brotherhood of Electrical Workers named as Appellees herein, will be referred to as "Local Union."

Reference to the Transcript of Record of the Clerk of this Court (Volume One of same) will be "RC-" (page number following.) Reference to the Reporter's Transcript of Proceedings (Volume Two of the Transcript of Record) will be "RT-" (page number following)

STATEMENT OF THE CASE

In its Statement of the Case Howard did not present all the facts elicited before the Court below, upon which the Court based its findings and the order from which Howard appeals.

Howard's complaint against Local Union alleges in part:

> "Under the terms of the collective bargaining agreement, the parties agreed under Article I, Section 4 that there shall be no stoppage of work either by strike or lockout because of any dispute over matters relating to this agreement.
>
> ". . . Defendant local ordered and coerced employees of Plaintiff to cease working for Plaintiff, and in accordance with said action by said defendant, said employees walked off the job and ceased working for the Plaintiff.
>
> ". . . Defendants have failed and refused to return said employees or furnish employees to these projects in violation of the collective bargaining agreement,"

and prayed for actual and exemplary damages for such alleged breach of contract.

In its motion for stay of proceedings Local Union incorporated the affidavit of Horace Bounds, its business manager. Such affidavit, uncontroverted by Howard, stated in part:

> ". . . . a dispute arose under said agreement in reference to the referral of employees for employment by plaintiff, as set forth in said agreement and led to the alleged work stoppage referred to in said complaint; that as a result of said dispute and without sanction of the local union and through no action or fault of the local union, some employees of plaintiff

did leave the employment of plaintiff; that plaintiff did, through its agent, the Arizona Chapter, Tucson Division National Contractors' Association, utilize the procedure set forth in Article I to settle such dispute, by requesting a joint Conference Committee meeting for September 5, 1967; that shortly before such meeting plaintiff requested cancellation of such meeting, and instituted its present action; that defendants were at all times and still are willing to abide by the arbitration procedure set forth in Article I of such agreement; that in answer to said action defendants specifically deny that they have instigated said strike or work-stoppage against plaintiff or have encouraged its members not to work for plaintiff."

Article I of Section 4 of the agreement states:[1]

"There shall be no stoppage of work either by strikes or lockout because of any proposed changes in the Agreement *or disputes over matters relating to the Agreement. All such matters must be handled as stated herein.*" (Italics supplied)

The article provides a complete system of arbitration. Section 5 of such article sets up a Joint Conference Com-

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[1] Article I is set forth in full, Local Union's Memorandum in Support of Motion to Stay Proceedings. (RC-10)

Page 2 of Howard's brief states that Local Union "specifically admit the allegations of the complaint as being true." Such is not the case. Local Union's motion generally admitted the allegations of the complaint for the purpose of conceding the walkout or wildcat strike but the uncontroverted affidavit of Local Union's business agent (made part of the motion) specifically denied the material parts of the complaint (RC-25). The District Court took the same view:

"Mr. Schneier's motion or his concession for the purposes of the motion, but I am going on Mr. Bound's affidavit which I think being specific must be controlling here because it deals with the very question here. Mr. Schneier concedes certain things, that there was a work stoppage, I believe." (RT-16)

mittee consisting of three representatives of the Union and three representing the Employer. Section 6 of such article states:

> "All grievances or questions in dispute shall be adjusted by the duly authorized representatives . . ."

Section 7 of such article states such questions shall be settled by a majority vote, with such decision becoming final and binding. Section 8 states that upon failure of the Committee to agree the matter is referred to a national council for decision.

Upon a hearing on Local Union's Motion to Stay Proceedings, the District Court entered its order staying Howard's action, and found:

> "There is a dispute . . . as to whether defendants breached Section 4 of Article I of the agreement [no-strike clause], by causing, ordering and coercing plaintiff's employees to cease working for plaintiff, and whether defendants engaged in a strike against plaintiff;
>
> "There is a dispute . . . as to whether defendants violated said agreement by failing to furnish employees to plaintiff's projects;
>
> "Such disputes are disputes regarding matters relating to said agreement, and as such are arbitrable matters under said agreement . . ."

QUESTION INVOLVED

The basic question involved is whether it can be said with positive assurance that the arbitration clause set forth in the agreement is not susceptible to an interpreta-

tion that covers the alleged disputes between Howard and Local Union.[2]

SUMMARY OF ARGUMENT

Article I, Section 4, states in unambiguous clear-cut language that there shall not be any "work-stoppage or lockout because of . . . or disputes over the matters relating to the agreement." Howard states that by Local Union's causing a strike and that by Local Union's failing to furnish men to man its jobs it suffered damages. Local Union denies the same, and states disputes have arisen under the collective bargaining agreement which must be settled by the arbitration processes under the agreement.

ARGUMENT

In 1960 the United States Supreme Court in a trilogy of landmark cases set forth the role of the judiciary in enforcing arbitration as a means of giving effect to the arbitration process, and effectuating congressional intent.

The foundation of Federal substantive law in this field lay in *Textile Workers v. Lincoln Mills,*[3] significant in that it established broad and effective remedial powers for the federal courts in order to enforce private commitments to arbitrate. Soon followed a trilogy of decisions[4]

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[2] *United Steelworkers of America v. Warrior and Gulf Navigation Co.* 363 U.S. 574: "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

[3] 353 U.S. 448 (1957).

[4] *United Steelworkers v. Warrior and Gulf Navigation Co.* 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel and Car Corp.* 363 U.S. 593 (1960) and *United Steelworkers v. American Manufacturing Company* 363 U.S. 564 (1960).

that fashioned a system of standards to guide the courts in the matter of determining questions involving arbitrability of labor disputes. It led this Court, among others, to adopt a broad premise:

> ". . . But to rule a controversy not arbitrable on scant evidence falling short of a clear demonstration of that fact would set at naught the equal important policy enunciated in the Steelworkers trilogy [citing cases n. 4 herein] to arbitrate all disputes not clearly outside the arbitration clause."[5]

Standards set by the United States Supreme Court in the trilogy and subsequent decisions mandate the lower courts prior to ordering arbitration, to determine among other things: Is there a collective bargaining agreement which obligates the parties to invoke the arbitration processes?[6] Is so, does such agreement provide for arbitration? Is there a claim that the provision of the contract is being violated? Is there a mutual obligation to invoke the arbitration processes, or is it limited just to one of the parties?[7] Finally, (the crux of the present case) where there is a no-strike clause, is the arbitration clause subject to being broadly construed or is it limited by specific provisions

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[5] *Association of Industrial Scientists v. Shell Development Co.* 348 (F.(2d) 385, 9th Circuit. "In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad." *Warrior,* n. 2.

[6] *Las Vegas Local Joint Executive Board of Culinary Workers v. Las Vegas Hacienda,* 9th Circuit, No. 21, 349. September 27, 1967. 383 F.(2d) 667. Defendant was not a party to a collective bargaining agreement: no duty to arbitrate.

[7] *Atkinson v. Sinclair Refining Company* 370 U.S. 238. No duty to arbitrate: ". . . the article expressly provides that arbitration may be invoked only at the option of the union . . ."

which excludes the dispute from arbitration, and thus negates the intention to condition the duty to arbitrate upon the absence of strikes?[8]

In the instant case it is apparent that the standards have been met: There is a collective bargaining agreement between the parties; Howard claims that provisions of the agreement have been violated by Local Union; the agreement provides for binding arbitration; the obligation to arbitrate is mutual.[9]

Thus, in the court below Howard was left with the same argument it is making here. Its argument below was:

1. The Local Union lost its right to arbitration because it caused a work stoppage; the *quid pro quo* for arbitration was the no-strike clause;

2. The arbitration clause should not be broadly construed because the:

> "very fact that the no-strike clause and the word 'dispute' are mentioned in the same sentence shows that one does not include the other,"

and therefore Howard's claim should be excluded from arbitration.[10]

The "Quid Pro Quo" Argument

The *quid pro quo* argument was given little effect in

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[8] *Drake v. Bakery Workers* 370 U.S. 254 (1962): ". . . by agreeing to arbitrate all claims without excluding the case where the union struck over an arbitrable matter, the parties have negatived any intention to condition the duty to arbitrate upon the absence of strikes."

[9] Article I, Section 4: ". . . no stoppage of work either by *strike or lockout* . . . all such matters must be handled as stated herein." (italics supplied) (RC-10)

[10] RT-19; Howard's Brief, p. 8.

the *Drake Bakeries* case.[11] There the United States Supreme Court held:

> ". . . Moreover, in this case, under this contract, *by agreeing to arbitrate all claims without excluding the case where the union struck over an arbitrable matter, the parties have negatived any intention to condition the duty to arbitrate upon the absence of strikes.* They have thus cut the ground from under the argument that an alleged strike automatically and regardless of the circumstances, is such a breach or repudiation of the arbitration clause by the union that the company is excused from arbitrating, upon theories of waiver, estoppel, or otherwise. Arbitration provisions, which themselves have not been repudiated, are meant to survive breach of contract, in many contexts, even total breach, and in determining whether one party has so repudiated his promise to arbitrate that the other party is excused, the circumstances of the claimed repudiation are critically important. In this case the union denies having repudiated in any respect its promise to arbitrate, denies that there was a strike, denies that the employees were bound to work on January 2 and asserts that it was the company itself which ignored the adjustment and arbitration provisions by scheduling holiday work . . ." (Italics supplied)

In order to distinguish the instant case from *Drake* Howard makes the statement:[12]

> "In the present case, unlike the Drake case, the Union repudiated the very disputes procedure it now seeks to invoke . . .
>
> "No such circumstances are present in the instant case. The Union had a dispute to be taken to arbitration. This it did not do, but it engaged in an illegal

[11] 370 U.S. 254 (1962).

[12] *Howard's Brief,* pp. 9 and 10.

strike in violation of the contract. No such mitigating circumstances as are present in Drake have been shown in our case nor indeed are present."

Such statement is not factual. The Local Union did exactly what the union did in *Drake*. By its agent's uncontroverted affidavit,[13] the Local Union denied such illegal strike. Such affidavit further alleged that it was Howard, not the Local Union, that refused to go into arbitration. It was Howard that cancelled the arbitration meeting set up for the purpose of resolving the disputes, one of which led to a wildcat strike.

In *Drake, supra,* the contract had what is commonly referred to as a "broad clause":

> "The parties agree that they will promptly attempt to adjust all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by this contract or relations between the parties hereto, directly or indirectly."

The Local Union contends that its clause in question is as broad as that in *Drake*. Such clause on its face states that there shall be no work stoppage because of . . . "disputes over the matters relating to the agreement." Local Union states that a dispute arose because of Howard's breach of the agreement, which led to a wildcat strike. Howard's complaint states that, contrary to the agreement, Local Union coerced and caused its members to strike. Local Union says it did not. Howard states Local Union, contrary to the agreement, refused to refer it men to man the jobs. Local Union says it did not.

Clearly, these are "disputes arising over matters relating to the agreement." The District Court so found.

[13] Attached to Motion to Stay and made part thereof. (RC-25)

Howard's "Exclusion" Argument

As stated in *Drake* the exclusion must be clearly stated. As stated in *Warrior*[14] it must be found "with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

The rationale of both cases is found in *Los Angeles Bag Company v. Printing Specialties*[15] a Ninth Circuit case. The Court below cited the case in answering Howard's *quid pro quo* and "exclusion" argument. The following colloquy took place between Howard's counsel and the District Court.

> MR. AISENBERG: We would contend this: That whether or not the Union instigated the strike is not a dispute over matters relating to this agreement. How does it affect this agreement whether the Union instigated the strike or not?
>
> THE COURT: Because you are claiming a breach of the contract, saying they did. The Union says we did not call a strike. There is a dispute between you as to whether there was a violation of the contract, there was a breach of the terms of the contract. And this says: All disputes as to matters relating to the agreement must be handled as stated therein, must be handled by arbitration. All disputes as to matters relating to the agreement, is my interpretation of the meaning of paragraph 4 of Article 1. As I see it, that is precisely what you are disputing about here is whether or not there is a breach of that.
>
> MR. AISENBERG: Isn't though a breach of the contract by strike or lock-out a matter divorced from arbitration proceedings by the very language of the clause itself? It renders the clause meaningless. If you

[14] n. 2.

[15] 345 F.(2d) 757 (1965).

can take to arbitration the matter of a work stoppage or strike, you render this Section 4 of Article 1 meaningless.

THE COURT: There are any number of cases that do hold precisely that you do take them to arbitration.

MR. AISENBERG: On different clause. We have got the Drake Bakery case —

THE COURT: Well, that is the Los Angeles Paper case, which says—here is the agreement in Los Angeles: Issues subject to the grievance procedure are limited to differences arising out of the interpretation, application or alleged violation of any of the express provisions of this agreement.

MR. AISENBERG: I believe the language is different. I believe the key thing in this, Your Honor, if I may submit, is that we have in the same clause—it sounds to me like it is a quid pro quo, one for the other, there shall be no strike because of a dispute.

THE COURT: We will go this far. That was in the Los Angeles Paper Bag case. There was a no-strike clause or illegal work stoppage and that provision was there. Then we have this further language that all grievances relating to the interpretation, application or alleged violation of any of the express provisions of this agreement. And the question was, as I read the case, whether there was an illegal walk-out—it says: From the beginning and throughout this case, the employer has unilaterally assumed that an unauthorized, that is, an illegal walk-out or work stoppage took place on August 17th. If such assumption were true in fact, then the acts of the employees in leaving the work would clearly be stoppage in violation of the agreement and the matter of discharge thereafter would be subject to discipline and would not be a basis for grievance procedure within the meaning of Article 2. Unfortunately for the employ-

er's position, the agreement does not have any clause giving the employer an absolute, uncontestable unilateral right to decide whether the strike or unauthorized work stoppage has in fact occurred. There is nothing in the agreement, however, which prevents the employer from making such an initial assumption when the work stoppage has taken place and proceeding to act thereon. Nevertheless, if this was done here, the employees affected by the employer's claim of unauthorized work stoppage challenge the factual truth of such assumption by filing a claim of grievance, then an issue is presented which under the agreement must be submitted to arbitration.

That language to me is rather applicable in this situation. And here, as there, the employer is just assuming that there was an illegal work stoppage. As the Court points out, that is fine if you do that in the first instance. But when it is challenged, then you have a dispute that has to be settled by arbitration.[16]

To sustain arbitration in *Los Angeles Paper Bag, supra,* this Court had to overcome the language of an exclusionary clause. In that case the employer contended that there was no duty on its part to arbitrate any matter involving discipline of an employee where there was a strike or stoppage of work, and where such discipline consisted of discharge. In the face of the union's contention that under the contract an employee could be discharged only for just cause, the employer relied on the exclusionary clause:

". . . but such discharges {for discipline} will not be subject to the grievance procedure and arbitration."

This Court found that the ultimate issue was whether there was an illegal work stoppage. But that was for the

[16] RT-18, 19, 20.

arbitrator to decide. If the arbitrator found such stoppage, that was the end of the matter. But if the arbitrator found no such stoppage, there was a remaining issue to be determined: Whether the discharge was for just cause.

The important principle found in *Los Angeles Paper Bag* is that this Court did preserve an arbitrable issue (discharge wtihout just cause) in the fact of an exclusionary clause, and resolved any doubt in favor of arbitration. In the instant case there is no exclusionary clause.

Desert Coca Cola Bottling Company v. General Sales Drivers[17] another case decided in this circuit, further points up the fact that arbitration will be ordered if there can possibly be any dispute to be so resolved.

In *Desert Coca Cola* the collective bargaining agreement contained an arbitration clause providing for the arbitration of grievances, and a no-strike-no-lockout clause because of any controversy, dispute or disagreement. An exclusion clause provided:

> "It is understood that the above shall not apply in any way concerning wages."

A dispute arose as to whether driver-salesmen should be paid overtime pay if they worked more than 40 hours a week. The union contended the exclusion clause removed from arbitration the question of overtime pay since the dispute was a dispute concerning "wages."

This Court, citing the trilogy and Warrior[18] cases, stated that any doubt must be resolved in favor of coverage by the machinery of arbitration. It found that various situations could arise wherein a driver-salesman could

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[17] 335 F. 2d 198 (1964).

[18] n. 4 and n. 2.

dispute the question of allocation of his hours of employment marshalled into one week of employment which might result in a different compensation over a two week period, if such hours were not so allocated. Thus such situation might concern compensation but not affect wages:

> "In other words, can a dispute affect compensation without affecting wages? We think it can fairly and honestly be thought that it can. We cannot hold that the term is 'clear and unambiguous' or say 'with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.' "[19]

The same principle was set forth in a Ninth Circuit Case, *Operating Engineers, Local 3 v. Crooks Bros. Tractor Company*.[20] In that case an employee was discharged for insubordination for refusing to take a job assignment outside his bargaining unit. One part of the agreement provided:

> "No employee shall suffer discharge without just cause, provided, however, the Employer shall be the sole judge of the qualifications of its employees . . . In the event of a dispute, the existence or non-existence of just cause shall be determined as provided in Section X of the agreement."

Section X provided for arbitration. The District Court held that insubordination bore on the worker's

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[19] The Court stated the "clear and unambiguous" test is the second circuit's verbalization of the test laid down by the Supreme Court. *Carey v. General Electric Co.* (1963) 315 F. 2d 499, 506, cert. denied 377 U.S. 908. Every grievance is arbitrable under a broad and comprehensive labor arbitration agreement unless the parties have shown by clear and unambiguous language in the contract that a particular dispute is not subject to its provisions.

[20] 295 F.(2d) 282 (1961).

qualifications and that the discharge was for grounds upon which the employer had reserved the right to act as sole judge. Therefore, the dispute was not one which the employer had agreed to submit to arbitration.

This Court held:

> "Whether 'qualifications' is to include such matters as insubordination or is to be confined to such matters as skill, experience and physical condition is, at best, a debatable question. The intention to exclude from arbitration the dispute here involved does not, we are satisfied, appear from the face of the contract with the clarity which is essential."

In reversing, the Court adopted the language of *Warrior* stating that in the absence of any express provision excluding a particular grievance from arbitration, only the "most forceful evidence of a purpose to exclude the claim from arbitration can prevail."

For a recent case involving almost identical facts and grievance procedure as the instant case, the 7th Circuit considered the question of arbitration in *Pietro Scalzitti Company v. International Union of Operating Engineers.*[21] In that case the employer sought to recover damages claimed to have resulted from an alleged breach of a no-strike clause, claiming, as in the instant case, that the union members struck the job, and the union refused to furnish employees. As a result, it could not finish its job and was damaged.

The union as here, demanded arbitration; the employer refused. In its supporting affidavit, the union did

[21] 351 F.(2d) 576 (1965).

not deny the walkout, nor did it deny it failed to furnish employees, but denied it violated the agreement.[22]

The 7th Circuit took the union's *legal conclusion* that it did not violate the agreement:

> ". . . to mean that Union denies responsibility for the strike[23] and denies it was required by the agreement to furnish Company with employees after the walkout."

The Court found that the collective bargaining agreement provided:

1. No employee shall leave the job without giving notice to his Employer and the Union;
2. No work stoppage by the union officers and business representatives until all of the procedures set forth in the agreement were exhausted;
3. Any difference or dispute arising as to interpretation or application of the terms of the agreement should be resolved by arbitration.

The employer's position was essentially the same as Howard's: a breach of the no-strike clause, and therefore the issues of fact are properly triable only by the District Court.

In sustaining the District Court's order staying the

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[22] In the instant case Local Union's affidavit not only stated the walkout was not its fault, but denied specifically that it instigated the work-stoppage or encouraged its members not to work for the employer.

[23] Howard claims that because "work-stoppage" is not modified by the phrase "in violation of this agreement" as in *Los Angeles Paper* then all work stoppages are non-arbitrable. Its brief, p. 17. In *Pietro Scalzatti* the Court holds a mere denial of a violation is enough to raise the issue. (That case had no such clause modifying "work stoppage.")

action pending arbitration the 7th Circuit cited *Drake,* and *Steelworkers v. American Mfg. Co.*[24]

> "The Court said in the latter case, 'The function of a court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract.' "

In construing the scope of the arbitration agreement, the 7th Circuit held:

> "While the contract language before us may not be wholly identical to the arbitration clause in *Drake Bakeries,* yet the instant contract excludes nothing from arbitration and clearly falls within the rationale of *Drake Bakeries.* The contract in question in the present case requires arbitration when 'any difference or dispute shall arise as to the interpretation or application of the terms of this agreement . . .' "

It is submitted that the clause in the instant case which requires arbitration of "disputes over the matters relating to the agreement," is as broad if not broader as that contained in *Pietro Scalzitti Company,* supra.

When compared with the Ninth Circuit cases of *Los Angeles Paper Bag, Desert Coca Cola* and *Operating Engineers, Local 3 v. Crooks Brothers,* supra, each containing a restrictive clause, the instant clause falls well within the premise set forth in this Court's recent pronouncement in *Association of Industrial Scientists v. Shell Development Co.:*[25]

> ". . . to rule a controversy not arbitrable on scant evidence falling short of a clear demonstration of that fact would set at naught the equal important policy

[24] 363 U.S. 593 (1960).

[25] n. 5.

enunciated in the Steelworkers trilogy to arbitrate all disputes not clearly outside the arbitration clause."

Local Union submits that it has met all of the standards of substantive law laid down by the United States Supreme Court, in its mandate to the lower courts: resolve any doubt in favor of arbitration. Once it is apparent on the face of the collective bargaining agreement that there is a clause providing for arbitration of a dispute arising under the agreement, that there is mutuality of arbitration, that a dispute has arisen under the agreement, and that there is a binding arbitration process, the court loses jurisdiction over the merits of the dispute even in the face of a no-strike clause, unless the dispute is clearly excepted by an exclusionary clause.

The instant clause is free from ambiguity; there is no exclusionary clause. It states simply and clearly that if there is any work stoppage because of any dispute arising under the collective bargaining agreement, such dispute shall be resolved by arbitration: "All such matters must be handled as stated herein." The Court found that there were such disputes arising under the agreement.

In the instant case the lower court did not have to search for any remaining issues as found in the Ninth Circuit cases cited herein. In fact, there was no doubt to be resolved in favor of arbitration.

CONCLUSION

In its brief Howard has attempted to rationalize the semantics of the instant clause, stating the clause is meaningless and should not be given effect. What Howard is really stating is that it does not like the present state of the law.

Howard would like to have this court go back to the law before the Trilogy (1960) and *Drake Bakery* (1962). The cases it cites in support of its position that violations of a no-strike clause are *ipso facto* not arbitrable, are no longer authoritative.[26]

If Howard wanted a breach of a no-strike provision remedied in Court it should have negotiated a collective bargaining agreement to that effect:

> "If the no strike provision of the contract was so fundamental and so basic to the company as not to be subject to arbitration, it was reasonable to expect that it would have been expressly excluded from the comprehensive language of the arbitration provision, if the parties so intended.
>
> "In other words, if an employer wants a breach of a no-strike provision prevented or remedied in court, rather than resolved in arbitration, it is up to

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[26] Howard's brief, pp. 12 and 13. e.g.: decided in 1954, 1956, 1957 and 1959. p. 19, 1957; p. 20, 1959. Howard makes the interesting contention (its brief, p. 11) that Section 9 of Article 1 of the Agreement is a *"condition precedent."* When a matter in dispute has been referred to arbitration "provisions and conditions prevailing prior to the time such matters arose shall not be changed or annulled;" i.e. that since there was a walkout, Local Union has no right to arbitrate. In support of this argument it cites *International Union v. Benton Harbor Malleable Industries,* 242 F.(2d) 356 a 6th Circuit Case decided in 1957, (its brief pp. 12, 13) the rationale of which is directly contra to *Drake Bakeries* (1962). A literal reading of Section 9 clearly shows that by bringing a dispute into arbitration, neither party can retaliate against the other by changing the provisions and conditions of the agreement. If, after bringing the matter into arbitration either party changes the terms, such section provides a new subject for arbitration. (Howard never took advantage of the section; it refused to arbitrate in the first instance.) *"Provisions and conditions"* refer to the collective bargaining agreement, and not to *"conditions* prevailing prior to the time of a work stoppage," as Howard argues.

> the employer to frame his arbitration clause accordingly. An employer referring to the [citing cases] cases would perceive that if he wished to obtain judicial remedy for future violations of the no-strike clause, his arbitration clause should not be broad, should be worded as *to specifically exclude the no-strike provision from the arbitration process,* and should contain no provision for the employer to invoke arbitration at his option . . ."[27] (italics supplied)

Howard's remaining complaint is that it is left without relief as to any damages it might suffer:

> "This would render the Employer's entire action meaningless if the Arbitration Panel had no right to assess damages—the crux of the Company's remedy."[28]

Los Angeles Bag and Paper Company, supra, held:

> "Here, Employer may properly submit the issue of damages to a trial court but the court cannot try the question of damages allegedly flowing from the stoppage until the arbitrator has first resolved the basic issue in favor of Employer."

The order of the District Court staying the action clearly limited the submission to the arbitration board the matter of resolving the questions of whether Local Union breached Section 4 of Article I of the agreement by causing, ordering and coercing Howard's employees to cease working, whether Local Union engaged in a strike against Howard, and whether Local Union failed to furnish employees to Howard's projects. By clear implication, if the issue is resolved against Local Union, the matter of damages will be heard by the District Court.

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[27] John H. Kirkwood, "The Enforcement of Collective Bargaining Contracts" 15 *Labor Law Journal* 111, February, 1964.

[28] Howard's brief, last page.

The finding of the District Court that "such disputes are disputes regarding matters relating to said agreement, and as such are arbitrable matters under said agreement," is supported by the facts and law in the case, and fully supports the order of the court staying the action until arbitration has been had in accordance with the terms of the agreement.

The Order Staying Action should be sustained.

Respectfully submitted,

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I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.

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Three copies of this Brief mailed this ..... day of May, 1968 to:

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